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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/485,320	02/08/2000	SHIGETO UCHIYAMA	Q57711	1771

7590 01/13/2003

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[REDACTED] EXAMINER

MARX, IRENE

ART UNIT	PAPER NUMBER
1651	17

DATE MAILED: 01/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action</b>	Application No. <b>09/485,320</b>	Applicant(s) <b>Uchiyama et al.</b>
	Examiner <b>Irene Marx</b>	Art Unit <b>1651</b>

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED Oct 29, 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

Therefore, further action by the applicant is required to avoid the abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**THE PERIOD FOR REPLY [check only a) or b)]**

- a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1.  A Notice of Appeal was filed on Oct 29, 2002. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.

2.  The proposed amendment(s) will not be entered because:

- (a)  they raise new issues that would require further consideration and/or search (see NOTE below);
- (b)  they raise the issue of new matter (see NOTE below);
- (c)  they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d)  they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: see attachment

3.  Applicant's reply has overcome the following rejection(s):  
rejection under 35 USC 103

4.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

5.  The a)  affidavit, b)  exhibit, or c)  request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
see attachment

6.  The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

7.  For purposes of Appeal, the proposed amendment(s) a)  will not be entered or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: none

Claim(s) objected to: none

Claim(s) rejected: 1, 3-7, and 9-12

Claim(s) withdrawn from consideration: \_\_\_\_\_

8.  The proposed drawing correction filed on \_\_\_\_\_ is a)  approved or b)  disapproved by the Examiner.

9.  Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). 12

10.  Other:

**IRENE MARX**  
PRIMARY EXAMINER  
ART UNIT 1651

Note:

The proposed amendment raises new issues that would require further consideration and/or search with respect to the proposed rewriting of claim 3 in independent form including new issues under 35 U.S.C §112 regarding the relationship between members of the species *S. intermedius* and *S. constellatus* and the strains of claim 3 in the claimed composition. As noted in the last Office action, the taxonomic status of these species is at least ambiguous, since the ATCC Catalogue adequately demonstrates that strains of each of *S. intermedius* and *S. constellatus* are now classified as *S. anginosus*. The relationship between the subject matter of claim 1 and of claim 3 remains unclear in this record.

The references listed on the form 1149 have been considered and initialed with the exception of reference JP 05/176711, which was considered previously.

***Response to Arguments***

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Applicant's arguments regarding the art rejection are persuasive and the art rejection only is withdrawn. The new matter rejection is maintained.

Upon cancellation of the non-allowable claims, claim 3 would be allowable if presented in independent form and if amended to clarify that the strains are viable in the composition.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (703) 308-2922. The examiner can normally be reached on Monday through Friday from 6:30 AM to 3:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn, can be reached on (703) 308-4743. The appropriate fax phone number for the organization where this application or proceeding is assigned is before final (703) 872-9306 and after final, (703) 872-9307.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to Customer Service whose telephone number is (703) 308-0198 or the receptionist whose telephone number is (703) 308-1235.

*Irene Marx*  
Irene Marx  
Primary Examiner  
Art Unit 1651